

# UNITED STATES DEPARTMENT OF JUSTICE

## ANTITRUST DIVISION



### WHAT YOU SHOULD KNOW ABOUT DETECTING AND PREVENTING ANTITRUST VIOLATIONS

#### Antitrust Primer for Procurement Professionals

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# AN ANTITRUST PRIMER FOR PROCUREMENT PROFESSIONALS

## I

### INTRODUCTION

American consumers have the right to expect the benefits of free and open competition, *i.e.*, the best goods and services at the lowest prices. Public and private procurement professionals often rely on a competitive bidding process to achieve that end. The competitive process only works, however, when competitors set prices honestly and independently. When competitors collude, prices are inflated and the customer is defrauded. Price fixing, bid rigging and other forms of collusion are illegal and are subject to criminal prosecution by the Antitrust Division of the United States Department of Justice.

In recent years, the Antitrust Division has successfully prosecuted regional, national and international conspiracies affecting agricultural products, construction, manufacturing, service industries, consumer products, and many other sectors of our economy. Many of these prosecutions resulted from information reported by alert and dedicated purchasing professionals. With such help, the prevention of your right to free and open competition will continue to be a top priority of the Antitrust Division.

This Primer is designed primarily for purchasing professionals. It contains an overview of the federal antitrust laws and the penalties that may be imposed for their violation. It briefly describes the most common antitrust violations and outlines those conditions and events that indicate anticompetitive activity so that purchasing professionals might better detect and report suspicious activity.

But note that Chapter 480, Hawaii Revised Statutes, includes state law counterparts to the federal antitrust laws. This Primer is therefore instructive as to violations of the Hawaii antitrust laws and the use of state and local funds by purchasing professionals.

## II

### FEDERAL ANTITRUST ENFORCEMENT

Enacted in 1890, the Sherman Act is among our country's most important and enduring pieces of economic legislation. The Sherman Act prohibits any agreement among competitors to fix prices. Criminal enforcement of the Sherman Act is the responsibility of the Antitrust Division of the United States Department of Justice. Violation of the Sherman Act is a felony punishable by a fine of up to

\$100 million for corporations, and a fine of up to \$1 million or up to 10 years imprisonment (or both) for individuals. In addition, collusion among competitors may constitute violations of the mail or wire fraud statute, the false statement statute, or other federal felony statutes, punishable by a fine and imprisonment.

In addition to a criminal fine or imprisonment, a corporation or individual convicted of a Sherman Act violation may be ordered to make restitution to its victims for all overcharges. Victims of bid-rigging and price-fixing conspiracies also may seek civil recovery of up to 3 times the amount of damages suffered.<sup>1</sup>

### III

#### FORMS OF COLLUSION

Most criminal antitrust prosecutions involve activity known as “bid rigging” or “price fixing.” Each of these forms of collusion may be prosecuted criminally if they occurred, at least in part, within the past five years. To prove such a crime, it is not necessary that the conspirators entered into a formal written or express agreement. Price fixing, bid rigging and other collusive agreements can be established either by direct evidence, such as the testimony of a participant, or by circumstantial evidence, such as suspicious bid patterns, travel and expense reports, telephone records, e-mails and business diary entries.

Under the law, price-fixing and bid-rigging schemes are per se violations of the Sherman Act. This means that where such a collusive scheme has been established, it cannot be justified under the law, for example, by arguments or evidence that the agreed-upon prices were reasonable, that the price-fixing agreement was necessary to prevent or eliminate price cutting or ruinous competition, or that the conspirators were merely trying to make sure that each got a fair share of the market.

#### A. Price Fixing

Price fixing is an agreement among competitors to raise, fix, or otherwise maintain the price at which their goods or services are sold. It is not necessary that the competitors agree to charge exactly the same price, or that every competitor in a

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<sup>1</sup> Chapter 480, Hawaii Revised Statutes, contains Hawaii’s antitrust laws. This chapter includes counterparts to some of the provisions in the Sherman Act and provides that violators of certain sections in chapter 480 may be subject to imprisonment as well as fines. Criminal enforcement of chapter 480 is the responsibility of the Attorney General of Hawaii.

given industry join the conspiracy. Price fixing can take many forms, and any agreement that restricts price competition violates the law. Other examples of price-fixing agreements include those to:

- (1) establish or adhere to price discounts;
- (2) eliminate discounts;
- (3) adopt a standard formula for computing prices;
- (4) maintain certain price differentials between different types, sizes or quantities of products;
- (5) fix credit terms;
- (6) not to advertise prices.

In many cases, participants in a price-fixing conspiracy also establish some type of mechanism to make sure that everyone adheres to the agreement.

## **B. Bid Rigging**

Bid rigging is the way that conspiring competitors effectively raise prices where purchasers -- often federal, state or local governments -- acquire goods or services by soliciting competing bids. Essentially, competitors agree in advance who will submit the winning bid on a contract being let through the competitive bidding process. As with price fixing, it is not necessary that all bidders participate in the conspiracy. Bid rigging also takes many forms, but bid-rigging conspiracies usually fall into one or more of the following categories:

- *Bid Suppression* -- In bid suppression schemes, one or more competitors who otherwise would be expected to bid, or who have previously bid, agree to refrain from bidding or withdraw a previously submitted bid so that the designated winning competitor's bid will be accepted.
- *Complementary Bidding* -- Complementary bidding (also known as "cover" or "courtesy" bidding) occurs when some competitors agree to submit bids that either are too high to be accepted, or contain special terms that will not be acceptable to the buyer. Such bids are not intended to secure the buyer's acceptance, but are merely designed to

give the appearance of genuine competitive bidding. Complementary bidding schemes are the most frequently occurring forms of bid rigging and defraud purchasers by creating the appearance of competition to conceal secretly inflated prices.

- *Bid Rotation* -- In bid rotation schemes, all conspirators submit bids, but take turns being the low bidder. The terms of the rotation may vary; for example, competitors may take turns on contracts according to the size of the contract, allocating equal amounts to each conspirator or allocating volumes that corresponds to the size of each conspirator company. A strict bid rotating pattern defies the law of chance and suggests collusion is taking place.
- *Market Division* -- Market division schemes are agreements in which competitors divide markets among themselves. In such schemes, competing firms allocate specific customers or types of customers, products or territories among themselves. For example, one competitor will be allowed to sell to or bid on contracts let by certain customers or types of customers. In return, he or she will not sell to or bid on contracts let by customers allocated to the other competitors. In other schemes, competitors agree to sell only to customers in certain geographic areas and refuse to sell to or quote intentionally high prices to customers in geographic areas allocated to conspirator companies.
- *Subcontracting* -- Subcontracting schemes are often part of a bid-rigging scheme. Competitors who agree not to bid or to submit a losing bid frequently receive subcontracts or supply contracts in exchange from the successful low bidder. In some schemes, a low bidder will agree to withdraw its bid in favor of the next low bidder, in exchange for a lucrative subcontract that divides the illegally-obtained higher price between them.

All forms of bid-rigging schemes have one thing in common: an agreement among some or all of the bidders which predetermines the low bidder and limits or eliminates competition among the conspiring vendors.

## IV

### **DETECTING BID RIGGING, PRICE FIXING, AND OTHER TYPES OF COLLUSION**

Bid rigging and price fixing and other collusion can be very difficult to detect. Collusive agreements are usually reached in secret, with only the participants having knowledge of the scheme. Knowledgeable purchasing agents, however, may correctly suspect that collusion exists because of suspicious bidding or pricing patterns or because a vendor says or does something that arouses suspicion.

#### **A. Bid or Price Patterns**

Certain patterns of bidding or pricing conduct seem at odds with a competitive market and suggest the possibility of collusion:

##### **1. Bids**

- The same company always wins a particular procurement, and there are no economic factors such as location cost advantages to explain this. This may be more suspicious if one or more companies, who effectively compete against the winning bidder on other procurements, continually submit unsuccessful bids;
- The same suppliers submit bids and each company seems to take a turn being the successful bidder;
- Some bids are much higher than published price lists, previous bids by the same firms or engineering cost estimates;
- Fewer than the normal number of competitors submit bids;
- A company appears to be bidding substantially higher on some bids than on other bids, with no apparent cost differences to account for the difference;
- Bid prices appear to drop whenever a new or infrequent bidder submits a bid;
- A successful bidder subcontracts work to competitors that submitted unsuccessful bids on the same project; and

- A company withdraws its successful bid and subsequently is subcontracted work by the new winning contractor.

## 2. Prices

- Identical prices may indicate a price-fixing conspiracy, especially when:
  - prices stay identical for long periods of time;
  - prices previously were different;
  - price increases do not appear to be supported by increased costs;
- Discounts are eliminated, especially in a market where discounts historically were given;
- Vendors charge the same prices to customers located locally as to those that must be shipped long distances. This may indicate price fixing, since shipping costs should be reflected in prices;
- Vendors are charging higher prices to local customers than to distant customers. This may indicate local prices are fixed.

## B. Suspicious Statements or Behavior

While vendors who collude try to keep their arrangements secret, occasional slips or carelessness may be a tip-off to collusion. Additionally, certain patterns of conduct or statements by bidders or their employees suggest the possibility of collusion. The following events each have triggered a successful criminal antitrust prosecution:

- There are irregularities (e.g., identical calculations or spelling errors) or similar handwriting, typeface or stationary in the proposals or bid forms submitted by different vendors. This indicates that the designated low bidder may have prepared some or all of the losing vendor's bid;
- Bid or price documents contain white-outs or other notations indicating last-minute price changes;



- A bidder requests a bid package for himself and a competitor or submits both his and another's bids;
- A company submits a bid when it is incapable of successfully performing the contract. This is likely a complementary bid. Occasionally, sham companies are set up solely for the purpose of submitting complementary bids;
- A company brings multiple bids to a bid opening and submits its bid only after determining (or trying to determine) who else is bidding;
- A bidder or salesperson makes a suspicious statement such as:
  - any reference to industry-wide or association price schedules;
  - advance (non-public) knowledge of competitor's pricing;
  - statements to the effect that a particular customer or contract "belongs" to a certain vendor;
  - statements that a bid was a "courtesy," "complementary," "token," or "cover" bid;
  - any statement indicating vendors have discussed prices among themselves or have reached an understanding about prices.

### **C. A Caution About Indicators of Collusion**

While indicators may arouse suspicion of collusion, they are not proof of collusion. For example, bids that come in well above the estimate may indicate collusion or simply an incorrect estimate. Another example, a bidder can lawfully submit an intentionally high bid that it does not think will be successful for its own independent business reasons, such as being too busy to handle the work but wanting to stay on the bidders' list. Only when a competitor submits an intentionally high bid because of an agreement with a competitor does an antitrust violation exist. Thus, indicators of collusion merely call for further investigation to determine whether collusion exists or whether there is an innocent explanation for the event in question.

## V

### CONDITIONS FAVORABLE TO COLLUSION

While collusion can occur in almost any industry, it is more likely to occur in some industries than in others. An indicator of collusion may be more meaningful when industry conditions are already favorable to collusion:

- Collusion is more likely to occur if there are few sellers. The fewer the sellers, the easier it is for them to get together and agree on prices, bids, customers or territories. Collusion may also occur when the number of firms is fairly large, but there is a small group of major sellers and the rest are “fringe” sellers who control only a small fraction of the market;
- The probability of collusion increases if other products cannot easily be substituted for the product in question;
- The more standardized a product is, the easier it is for competing firms to reach agreement on a common price structure. It is much harder to agree on other forms of competition, such as design, features, quality or service;
- Repetitive purchases may increase the chance of collusion, as the vendors may become familiar with other bidders and future contracts provide the opportunity for competitors to share the work.

## VI

### WHAT YOU CAN DO

If companies are conspiring to collude on prices, the purchasing agent is the last person in the world that they want to know about the scheme. For this reason, even the most conscientious buyer can be victimized. Nonetheless, there are some procedures that can be established to discourage anticompetitive activity:

- Expanding the list of bidders will make it more difficult for bidders to collude. Buyers should solicit as many reliable sources as economically possible. As the number of bidders increases, the probability of successful collusive bidding decreases. While there is no magic number of bidders above which collusion cannot occur, past experience suggests that collusion is more likely to arise where there are five or fewer competitors;

- Require the submission of sealed bids to be delivered by a specified time and to a specified location and date and time stamp the bids when they are received;
- Set the public bid opening at least one day after specified due date;
- Require a certification of independent price determination to be submitted with all bids. Avoid abstract words such as “competitor,” “collude,” or “sham” in certification;
- Retain all bids, envelopes, facsimile transmittal sheets or e-mail transmittal messages, that the bids or quotes were in or which accompanied the bids;
- Ensure that all purchasing department employees are familiar with the indicators of bid rigging, price fixing and other types of collusion;
- Maintain procurement records, e.g., bid lists, abstracts and awards. When collusion is suspected, it is necessary to review the procurement history to determine if a pattern of bid allocation or rotation is present;
- Ask questions. If the prices or bids submitted don’t make sense, press your vendors to explain and justify their prices. You may be provided with a reasonable explanation or your suspicions may be heightened by a bogus answer. Either way, you learn more about your markets and demonstrate your interest in competitive prices;
- Know and understand the dynamics of the markets in which you make major purchases. A knowledgeable buyer may correctly suspect collusion from market behavior that may not arouse suspicions in an uninformed buyer.

## VII

### REPORT YOUR SUSPICIONS

We encourage all buyers to report suspicions of collusion through appropriate channels in your organization. The Antitrust Division and the Attorney General of Hawaii cannot promise that every reported suspicion will warrant investigation, but we will carefully consider all information provided to us. Your observations may add to information we already have about an industry or, together with other reports, indicate a more widespread problem. Your call will always be appreciated and kept in confidence, and, when warranted, we will conduct an investigation.

## VIII

### COMMON QUESTIONS OR CONCERNS

In talking to thousands of purchasing professionals, we understand that there are some concerns about reporting a suspected antitrust violation. Some of these concerns may be eased, however, by understanding how the Antitrust Division values and treats citizen complaints.

- But I Just Have a Suspicion

How could you have anything more? Even the most knowledgeable and conscientious purchasing official do not have enough information to show the existence of price fixing or bid rigging. Reported suspicions, however, sometimes on their own or more often coupled with information the Antitrust Division and the Attorney General of Hawaii may have from similar complainants, other sources or previous investigations, may be sufficient to warrant an investigation. While some reported suspicions are not sufficient on their own to start an investigation, they may still provide the Antitrust Division and the Attorney General of Hawaii with valuable market intelligence.

- I Don't Want to Get Anyone in Trouble

Purchasing professionals may fear a vendor will be debarred, publicly accused or even indicted based solely on their suspicions. Be assured that reported information or suspicions are just the first step in a very incremental and thoughtful process before an investigation is begun. Only if other evidence develops will a criminal investigation begin, and criminal charges are never brought unless that investigation develops sufficient evidence to establish the existence of price fixing, bid rigging, or market allocation.

- I Don't Want to be Identified

Purchasing professionals value their relationships with vendors and do not want to be identified, especially because their suspicion may prove to have an innocent explanation. The Antitrust Division and the Attorney General of Hawaii fully appreciate this, and your complaint will be kept confidential.

## IX

### CONCLUSION

The attorneys and support staff of the United States Department of Justice, Antitrust Division are here to serve you in enforcing the Antitrust laws. You can call on our assistance and ensure that all consumers enjoy the benefits of the American free enterprise system by reporting suspicious behavior that raises antitrust concerns

Similarly, the attorneys and support staff of the Department of the Attorney General are available to assist you, as well as facilitate your communications and interaction with the United States Department of Justice.